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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 138

THE EXCHANGE NATIONAL BANK OF OLEAN,
Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1164

THE EXCHANGE NATIONAL BANK OF OLEAN,
Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

The Petition fails to meet the test provided in Rule 19 or to show any other basis for granting certiorari.

Rule 19 of this court, which is not mentioned in petitioner's application, provides the considerations governing review on certiorari. This rule, formulated more than 40 years ago, embodies the criteria developed prior to its adoption and followed by the court since, in determining whether a particular case merits the court's consideration. Review is not a matter of right, but discretion, and will be

granted "only where there are special and important reasons therefor."

Petitioner seeks to review the circuit court's unanimous affirmance of the district court's holding that petitioner was not entitled to recover under a bankers indemnity bond for certain defaulted loans. This is a dispute between particular litigants of private, not public, interest. The rights of the parties rest upon local law and circumstances and raise no important federal question. The case does not warrant review under Rule 19 or on any other basis urged in the petition. This court has twice previously declined to review similar cases raising the same question. *North Carolina Nat'l Bank v. U. S. Cas. Co.*, 317 F. 2d 304 (4 Cir.), cert. denied, 375 U. S. 905 (1963), and *First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co.*, 309 F. 2d 702 (6 Cir. 1962), cert. denied, 372 U. S. 953 (1963).

Petitioner's Argument for Review

First, petitioner claims that the Circuit Court of Appeals improperly "disregard[ed] the considered judgment of the New York Appellate Division" in interpreting the coverage under a bankers indemnity bond. The Circuit Court of Appeals citing its decision of *Fitzgibbon Boiler Co. v. Employers' Liab. Assur. Corp.*, 105 F. 2d 893 (2 Cir. 1939) which reviewed prior New York authorities, concluded that the instruments upon which petitioner suffered its loss were not "counterfeit" within the meaning of the bond. Referring in particular to Clause E of the bond, the Circuit Court of Appeals found the decisions of the First and Third Departments of the Appellate Division not wholly in agreement, *Johnstown Bank v. American Sur. Co. of New York*, 6 App. Div. 2d 4, 174 N. Y. S. 2d 385 (3d Dept.) *motion for leave to appeal denied*, 5 N. Y. 2d 705, 153 N. E. 2d 796,

179 N. Y. S. 2d 1026 (1958), and *Prudential Capital Corp. v. Royal Indem. Co.*, 21 App. Div. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964). The court rejected the bank's argument, made again here by the petitioner, that the First Department decision in the *Prudential Capital Corp.* case required a decision in its favor. Finding the law unsettled between the various departments, the Circuit Court of Appeals exercised its choice and adopted the rule of the Third Department in *Johnstown Bank.* In making this choice the court cited, amongst other authorities, *North Carolina Nat'l Bank v. U. S. Cas. Co.*, and *First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co., supra.*

Such a decision on a matter of state law involving a dispute between private parties in connection with an insurance contract issued and to be performed wholly within the state is not an important state question decided contrary to applicable state law. See *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 205, 206 (1938), and *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

Secondly, petitioner seeks review "in order to implement the principle enunciated by this court" with respect to change in venue. Although petitioner cites *Van Dusen v. Barrack*, 376 U. S. 612 (1964) which held there had been an improper change of venue, petitioner makes no such claim in the present case. With the contract written, performed and the loss occurring all in New York, the Circuit Court of Appeals quite properly found "no error in effecting this transfer" from the District Court of defendant's home office to the District Court in New York where the loss occurred. Petitioner argues, notwithstanding the admittedly proper change in venue, that certiorari should be granted

because under Pennsylvania, not New York, law petitioner claims it would have been entitled to judgment in its favor.

Regardless of where the case had been heard, New York law, as the Circuit Court of Appeals held, would have applied. The fact that the Appellate Division decisions in New York were not wholly in accord, does not mean that the Court was required to abandon the New York law for the law of Pennsylvania. *Waggaman v. General Finance Co.*, 116 F. 2d 254 (3 Cir. 1940) and other authorities cited by petitioner (page 11) do not support this view. The matter of coverage under the bond was controlled by local law and did not present "a federal question in a way in conflict with applicable decisions of this court."

The statement of this Court in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955) lays at rest both of petitioner's arguments for review. In discussing Rule 19 and the considerations governing review on certiorari this court, in *Rice v. Sioux City Cemetery*, said:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163; see also address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst., 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Conclusion

Petitioner has failed to show more than a private dispute between private parties with respect to insurance coverage under local law. Proper grounds for review on certiorari have not been established and the petition should be denied.

Respectfully submitted,

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